IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 435 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NASHIRKHAN @ BAMBAIYA SABIRKHAN
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 435 of 1996
MRS SHILPA J UNWALLA for Appellant No.
MR KC SHAH, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 13/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. The appellant original accused has challenged in this appeal judgment and order of conviction and sentence passed against him by the Ld. Addl. City Sessions Judge, Court No. 5, dated 24th May, 1996 in Sessions Case No. 380/1995, whereby he has been convicted for the offence punishable under section 302 of the Indian Penal Code [for short 'IPC'] and sentenced to suffer rigorous imprisonment [RI] for life.

2. The case of the prosecution is that the appellant was having illicit relations with the deceased. The deceased was married to Prosecution Witness [P.W.] no. 5 - Alibhai alias Don Noormohmed. It appears that the appellant was working as an employee of P.W. 5 and he often visited the house of P.W. 5. In the process he developed intimacy with the deceased. According to the prosecution, the deceased and the appellant often met at the secret places and one of such places was the house of P.W. 1 - Zarinabibi Sirajkhan.

2.1. On the date of incident i.e. 1st May, 1994 as per the previous arrangement the appellant had already gone to the house of P.W. 1. Later on, in the afternoon the deceased alongwith P.W. 2 - Zarinabibi alias Zahirabanu Munnabhai went to the house of P.W. 1. The deceased and the appellant sat on the Ota [small Varanda] situated on the back side of the house. House of P.W. 1 consisted of open space in front, thereafter the entrance and one room and thereafter the kitchen. Touching the kitchen on the back side, there is Ota where the appellant and deceased sat. It is covered with jute cloth from the sides so as to have some privacy because there is a small passage situated near the house of P.W. 1 adjoining this Ota. It is the case of the prosecution that at that time P.W. 1 was all alone in the house except the appellant and the deceased because P.W. 2 had gone to purchase some utensils. P.W. 1 was cleaning her utensils in the open space in the front of the house and sometime around 3.30 p.m. the appellant came there and told her that he was going to fetch Soda for the deceased so as to pacify her as he had given a slap to her. As he did not return for 15 to 20 minutes, P.W. 1 saw from the aperture in the door and she found that the deceased was lying on the Ota and her face was covered with Odhni and the lower portion was covered with Lunghi. She also noticed that foam was coming out of the mouth and also the blood. The eyes of the deceased were open. She, therefore, went near her and tried to call her and to

revive her by sprinkling water over her but there was no response. P.W. 1 immediately looked for the appellant but he could not be found. In the meanwhile the mother-in-law of P.W. 1 and P.W. 2 came there. P.W. 1 also informed Police Officer standing on the road and he deputed a constable to go with P.W. 1. This policeman accompanied the mother-in-law of P.W. 1, namely Noorbanu P.W. 6 and P.W. 2 to Shardaben Hospital to remove the deceased there for treatment. It appears that deceased never regained consciousness and she ultimately expired at about 9.00 p.m.

2.2. P.W. 1 contacted the police at Gomatipur Police Station and lodged complaint against the appellant while the deceased was admitted in the hospital. On receiving the information, the police registered the offence against the appellant. The police also received at about 6.00 p.m. Vardhy from Shardaben Hospital wherein it was stated that one Jannatbanu was admitted in the emergency ward because she was strangulated with the means of a Dupatta. It was intimated that the appellant had strangulated her. The 2nd Police Inspector, namely Jagdishchandra Manilal Shrimali P.W. 9 tried to get the dying declaration recorded by sending Yadi to the Executive Magistrate, but it could not be recorded. He also informed the husband of the deceased. Later on he received Vardhy from the hospital at the police station informing him about the death of Jinnatben i.e. the deceased.

2.3. The police commenced usual investigation and in course of the same recorded statements of various persons, drew panchnamas, got the post mortem examination done, etc.

2.4. It appears that the appellant had absconded and could not be found for over one year. It was, therefore, decided to pray for grant of 'A' summary. However, the appellant was arrested by the Police of D.B. Road Police Station of Bombay and, therefore, P.W. 10 Prakashchandra Ramjibhai Mehra was deputed to Bombay to arrest and secure the presence of the appellant. He obtained transfer warrant from the Court of Ld. Metropolitan Magistrate, Court No. 10, Ahmedabad and brought the appellant to Ahmedabad from Bombay on 3rd September, 1995 and his remand was sought from the Ld. Metropolitan Magistrate. Whatever investigation that was necessary after the remand was done and ultimately the charge-sheet was submitted.

2.5. After the investigation was over, police

submitted charge-sheet in the Court of the Ld. Metropolitan Magistrate, who in turn committed the case to the Court of Sessions since the offence under section 302 of the IPC is exclusively triable by the Court of Sessions.

2.6. The Ld. Sessions Judge framed charge at Exh. 1 on 13th December, 1995. The appellant pleaded not guilty and claimed to be tried.

2.7. The prosecution, to support its case, examined 10 witnesses and also produced documentary evidence. After completion of the recording of the oral evidence, further statement of the appellant was recorded under section 313 of the Code of Criminal Procedure. According to him, he had not committed any offence. He denied all the circumstances appearing against him in the evidence. The learned trial Judge at the end of the trial found him guilty of committing the act alleged against him and convicted him for the offence punishable under section 302 of the IPC and sentenced him to suffer RI for life. It is this judgment and order of conviction and sentence which are challenged in the present appeal by the appellant.

3. We have carefully gone through the oral as well as documentary evidence of the case and with a view to reappreciate the same, we have also given our careful consideration to the submissions made by Mrs. Shilpa J. Unwala, learned advocate for the appellant and Mr. KC Shah, Ld. APP appearing for the State. At this juncture it may be stated that while going through the evidence, it appeared to us that certain clarifications which were required to be made by the Medical Officer in his evidence were not there and neither the prosecution nor the defence had put any question to him on this aspect. We, therefore, decided to adduce additional evidence. The said Medical Officer was called to give evidence before this Court by issuing summons dated 6/10/2004. In response to the said summons, he had remained present before this Court on 7/10/2004. His further evidence has been recorded at Exh. 48. We will refer to the same when we discuss the medical evidence.

4. Mrs. Shilpa Unwala has submitted that the case rests solely on the circumstantial evidence and the circumstances are not adequate enough to form a complete chain pointing to only one possibility, namely the guilt of the appellant and, therefore, he should be given benefit of doubt. She has further submitted that considering the facts and circumstances of the case, the

possibility of the deceased having committed the suicide cannot be ruled out. According to her, the death has been caused due to strangulation which could either be homicidal or suicidal and when there is no direct evidence, such possibility of suicidal death cannot be ruled out. Lastly, she has submitted that there is no motive for the appellant to cause the death of the deceased. She has, therefore, prayed that the appeal be allowed.

4.1. As against that, Mr. KC Shah, Ld. APP has supported the judgment and order of conviction and sentence. According to him, the conclusion drawn by the trial Court is just and proper and even though this is a case of circumstantial evidence, the circumstances appearing on record are good enough to base the conviction of the appellant for offence under section 302 of the IPC. He has, therefore, submitted that the appeal be rejected.

5. The record of the case shows one undisputed fact that the appellant had developed illicit relations with the deceased and that they used to off and on meet at some pre-decided places. One of such places was house of P.W. 1.

6. The prosecution has examined P.W. 1 Zarinabibi Sirajkhan at Exh. 4. In her evidence she has stated that she was staying with her husband and mother-in-law in Waqf Committee Chawl near petrol pump, Hathikhai area in Gomatipur. On the date of incident i.e. 1st May, 1994, her husband had gone to ply rickshaw on rent and her mother-in-law had gone to her maternal aunt. At that time the appellant and the deceased alongwith P.W. 2 had gone to her house and shortly thereafter P.W. 2 left the place. She has stated that appellant used to visit her house once in a fortnight or month. She has further stated that deceased and the appellant were sitting on the Ota on the back side of the house. She was cleaning the utensils in front of her house in the Osari. At around 3.30 p.m. the appellant came there and told her that he was going to get Soda for the deceased as he had given a slap to the deceased. Since he did not return for about 20 minutes, this witness tried to see what the deceased was doing. She, therefore, looked through the aperture in the door and found deceased lying on the Ota with her face covered with Odhani and the lower portion with Lungi. She immediately went to her and tried to call her and also to revive her, but there was no response. She, therefore, sprinkled water from the cooler, but the deceased did not

regain consciousness. In the meanwhile persons got collected and P.W. 3 and P.W. 10 also arrived there. They, with the help of police, removed her to Shardaben Hospital, where the deceased died at about 9.10 p.m. In the cross-examination by the defence, it is tried to suggest to her that the Varanda on which the deceased and the appellant were sitting was open and accessible to all. The locality being crowded, there was hardly any possibility for the appellant to commit the murder of the deceased. It has been further put to her that she has not stated in the complaint that the appellant had gone to fetch soda at the Pan shop and when she inquired at the Pan shop and also at the bakery, he was not to be found and at that time the Panwala told her that he had seen the appellant boarding the bus and going away. She has admitted that this fact has not been stated by her in the complaint. It has been further put to her that she had not stated in the complaint that at this time a rally was going on the road and there were Police Officers, who were contacted by her and the Police Officers sent two police constables to her at the scene of offence. She also admitted that she has not stated so in the complaint. However, at this juncture it may be noted that if the complaint is perused, in it she has definitely stated that the appellant told the witness that he had slapped the deceased and, therefore, to calm her down, he was going to get soda. She has further admitted that whatever that would happen at the back side she would not be able to know while she was in the front portion of the house. She has further stated that because of the conduct of the appellant and deceased was not good, they were asked to sit on the Varanda at the back of the house. She has, however, denied the suggestion of the defence that the workers working in the adjoining premises come there to ease themselves. She has, however, admitted that she had not heard any shout or commotion from the back side of the house.

6.1. P.W. 2 - Zarinabibi @ Zarinabanu Munnabhai has been examined at Exh. 17. She has stated that on the day of the incident, she and the deceased had gone to the house of P.W. 1 at about 2.30 p.m. At that time the appellant was sleeping there. They woke him up. It is further stated that appellant told the deceased that he was going to Bombay and she should come to the station to see him off. Deceased refused to do so by telling the appellant that if he forcibly pulled her in the train, her daughter would be put in very pitiable condition. This witness has further stated that thereafter the deceased told her to go and purchase some utensils since the marriage of her daughter was to be

arranged. She, therefore, left the place. When she returned to the house of P.W. 1, she saw that the deceased was lying on the floor and the appellant was not to be found. P.W. 1 informed her what had happened. In the cross-examination this witness has denied the suggestion of the defence that she has not stated before the police that the appellant had asked the deceased to go to the station with him and that the deceased had declined to do so. She has also denied having not stated before the police that the deceased had told the appellant that if he pulled her in the train, her daughter will be in a pitiable condition.

6.2. The prosecution has also placed reliance on the evidence of P.W. 5 - Alibhai @ Don Noormohmed, Exh. 25, who is the husband of the deceased. He has deposed before the trial Court that in the year 1994 he was staying in Thakore Vas locality in Sarkhej area. Prior to that, he was staying at Nagori Vad, Shahpur. At that time he had married to the deceased, who belonged to Vaghri community and her original name was Jainika. He has admitted in the evidence that the deceased had very close relations with the appellant. He has also stated that on 30th April, 1994 Noorbibi i.e. mother-in-law of P.W. 1 had come to call the deceased, but he had not permitted her to leave the house. However, on 1st May, 1994, when he went home for having meals, he was informed by the police that the deceased was admitted to Shardaben Hospital emergency ward and he, therefore, went there. When he reached there, she had already expired. There is hardly any cross-examination of this witness.

6.3. Apart from these witnesses, the prosecution has also examined P.W. 6 - Noorbanu Nasirkhan Exh. 26, who is mother-in-law of P.W. 1 and P.W. 4 Habiburraheman Abdulaziz at Exh. 20, who is a panch witness, but their evidence is not of much importance. The Investigating Officer is one Jagdishchandra Manilal Shrimali, P.W. 9, Exh. 35. He has in detail narrated the course of investigation and in what manner the appellant who was earlier absconding, was apprehended by the police. In the cross-examination he has denied the suggestion of the defence that the deceased had strangulated herself with the means of her own Dupatta. He has also denied the suggestion that the place of offence was such that any other person could also come there and cause murder of the deceased. The defence has, however, brought on record the contradictions and omissions which have been in the evidence of P.W. 1 and P.W. 2.

6.4. The most important evidence is that of Dr. Deven Govindbhai Desai, P.W. 3 Exh. 18, who is attached to B.J. Medical College and working as Associate Professor in Forensic Science Department. Since there is no direct evidence on record, the evidence of this witness assumes much importance. As stated above, on certain aspects certain clarifications were required to be had from this witness. We had summoned him before us and examined him on 7th October, 2004. He has performed the post mortem examination of the body of the deceased. He has recorded external injuries found on the deceased in column no. 17 of the post mortem notes which have been produced at Exh. 19. They are as follows :-

1) Blue coloured Bruise of 2.5 x 20 over the right side face on outer aspect of right upper eyelid with its upper border abraded at size 0.5 x 0.2 cm.
2) Ligature mark with very irregular marking and various puckering mark on the skin of front of neck at the level of thyroid gland which is 11 cm. in length with 9 cm. below chin in the midline extending on both sides upto anterior border of stanodedomostoid muscles and 1.5 x 7 cm. below right angle of mand 10 & 6.5 cm below left angle of mondible showing abraded margins and is grooved. Upto the anterior border of stanodedomostoid there is well marked abrasion, but on the posterior part only ligature impression is going backwards, slightly upwards and completely enarding the neck.
3) On the right side anterior border of trapezium showing packering of skin on 4.5 x 1 cm area.
4) Abrasion of 3.5 x 2.5 cm. on upper part of neck just posterior to right angle of mondible with irregular edges.
5) Abrasion 1.2 x 1 cm. on the left side of neck, which is 4 cm. left to midline above injury no. 2.
6) Abrasion 1 x 0.3 cm. on right side of neck 2 cm. right to midline.
7) Abrasion (semicircular shaped) of 2 x 1.3 cm. on the posterior area just above injury no. 2 on right side of neck. All abrasions were bright and covered with clotted blood
8) Injection mark on the (1) Precordial area (2) Right elbow outer front aspect (3) left elbow outer front aspect (4) Left wrist outer front aspect.

He has also noted and deposed about the internal injuries

which show fracture of Hyoid bone and thyroid cartilage showing midline fracture in the front. According to him, the injuries were sufficient in ordinary course of nature to cause death. He has further stated that injury no. 2 could be caused if the person is strangulated with the means of the piece of cloth like Dupatta or the Odhani. There is hardly any cross-examination of this witness. Since the evidence of this witness did not very clearly show whether there was possibility of self-strangulation, we had issued the summons to the doctor. Before us his examination-in-chief was taken by the Ld. APP Mr. KC Shah. In it he has stated that the injuries suffered by the deceased were not self inflicted injuries. According to the witness, this was a case of homicide and not suicide. Before us he has been cross-examined by Mrs. SJ Unwala, learned advocate for the appellant. We have also put certain questions to him. The sum and substance of the evidence which has been recorded before us is that the injuries suffered by the deceased were not self inflicted but they were caused by the external force. He has adequately assigned reasons for his opinion. To our question that but for the injury to the hyoid bone would he be able to say for sure that it was homicidal death, he has given answer in affirmative. He has stated the reason as under :-

> "Because there are marks of struggle on the body of the deceased. Further the ligature mark is at a lower level and continuous which cannot be there in the case of suicide."

He has also given the following answer to our question that are the factors which helped you in forming opinion that it is not a case of self-strangulation :

> "In the case of self-strangulation, such extensive injuries would not be there, because after applying some pressure, on account of suffocation, the person would lose grip and would leave the means of strangulation."

Thus, according to the expert, this is a clear case of homicide and not suicide.

6.5. When this is a case of homicide, it would be necessary for us to find out whether the circumstances are sufficient to form a complete chain establishing the guilt of the appellant. Considering the facts of this case, the prosecution has been able to successfully prove the following circumstances :-

i. The appellant was working at the place of Alibhai, the husband of the deceased and as such he had come in contact with the deceased.

ii. The appellant and the deceased had developed close intimacy and that had resulted into illicit relations between them.

iii. On account of the illicit relations the appellant and the deceased were meeting at different places away from the house of the deceased.

iv. P.Ws. 1, 2 and 6 were helping the appellant and deceased to have meeting.

v. On the date of incident one such meeting was arranged at the place of P.W. 1 and P.W. 2 had helped the deceased to reach there.

vi. The appellant and the deceased were asked to sit in the Varanda at the back of the house as it was a covered place with jute cloth and nobody was there to disturb them.

vii. At the time when the meeting was going on between the two, P.W. 1 was working in the front side of her house and there was no one else in the house.

viii. The appellant wanted the deceased to go with him, naturally on permanent basis, by abandoning her family. It may be noted here that though P.W. 2 has omitted to mention this fact in her police statement, we do not have any doubt regarding that statement because when both of them were deeply in love, such an offer emanating from the appellant would be very natural. Further the deceased would not be willing to go with him since she had a daughter of tender age.

ix. The appellant had adequate opportunity to commit the crime. The act appears to have been committed by him because of the refusal of the deceased to go with him.

x. The act having been committed by a stranger or third person is totally ruled out by the prosecution witnesses. Further there is nothing on record to show that it was husband of the deceased who could have done this, as tried to be submitted by Mrs. Unawla.

xi. The injuries found on the deceased are not self-inflicted, meaning thereby the appellant could be the only person to have caused these injuries to her.

xii. The injuries are found to be sufficient in ordinary course of nature to cause death.

xiii. Immediately after the incident the appellant left the place telling P.W. 1 that he was going to purchase soda for the deceased. He never returned.

xiv. Since the day of the incident the appellant was not to be found and he was ultimately apprehended

from Bombay after a period of more than one year. In other words, all that period the appellant kept on absconding.

7. All these circumstances viz. the motive, the deceased last seen in the company of the appellant, false excuse to P.W. 1 to go away from the place, homicidal death, appellant absconding after the incident, etc., have been not only individually established by the prosecution but they form a complete chain leading to the only one hypothesis, namely the guilt of the appellant. If that be so, we do not find any error having been committed by the trial Court and we are completely in agreement with it that it is the appellant who has committed the act and the act falls within the four corners of section 300. The trial Court's order regarding conviction and sentence of the appellant under section 302 of the IPC is, therefore, just and proper and we do not see any reason to interfere with the same.

8. In the result, this appeal fails and it is dismissed.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.